Surandran a/l Rajaretnam v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO D 09-58 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
16 FEBRUARY 1998

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Trial judge applied prima facie test and called upon accused to enter defence — Argument that whatever be the standard of proof applied, the judge would have arrived at the same decision — Whether there was misdirection on the standard of proof — Whether misdirection was capable of being cured by the provision of s 422 of the Criminal Procedure Code — Criminal Procedure Code (FMS Cap 6) ss 180 & 422*

The appellant was convicted in the sessions court and sentenced to imprisonment and fine. The appellant's appeal to the High Court was dismissed, and hence this appeal. It was contended that at the close of the prosecution case in the sessions court, the judge applied the prima facie standard of proof before he called upon the appellant to enter his defence. It was argued that at the time of the trial of this case, the proper standard of proof to be applied at the close of the prosecution's case was the beyond reasonable doubt standard. Therefore, the sessions judge erred in law in not holding that the prosecution was bound by law to prove its case beyond reasonable doubt at the close of its case. The deputy public prosecutor, while conceding that the judge did not apply the beyond reasonable doubt standard, contended that whatever be the standard of proof applied, the judge would have arrived at the same decision.

Held, allowing the appeal:

The issue in this appeal was not as contended by the Deputy Public Prosecutor. The issue was whether the judge applied the right and proper standard of proof at the close of the case for the prosecution. The issue of whether the prosecution at the close of its case is required to prove a prima facie case or to prove a beyond a reasonable doubt case has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 where it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan*'s decision, must necessarily be beyond reasonable doubt. Moreover, the amendment to s 180 of the Criminal Procedure Code (FMS Cap 6) to provide for a prima facie standard of proof at the close of the case for the prosecution took effect only after 31 January 1997 and there is nothing in the amendment to give it retrospective effect. Therefore, in the instant appeal, the judge erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution. There

was clear misdirection by the trial judge. A misdirection of this nature, which went to the very root of the matter, was incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involved a principle of general importance in the administration of justice (see p 52C–H).

[Bahasa Malaysia summary

Perayu disabit di mahkamah sesyen dan dijatuhkan hukuman penjara dan denda. Rayuan perayu kepada Mahkamah Tinggi telah ditolak, maka rayuan ini dibuat. Ia dihujahkan bahawa di penutup kes pihak pendakwa di mahkamah sesyen, hakim telah memakai darjah membukti prima facie sebelum beliau memanggil perayu memasukkan pembelaannya. Adalah dihujahkan bahawa pada masa perbicaraan kes ini, darjah membukti yang wajar dipakai di penutup kes pihak pendakwa ialah darjah melampaui keraguan munasabah. Maka, hakim sesyen terkhilaf dari segi undang-undang dalam tidak memutuskan bahawa pihak pendakwa wajib di bawah undang-undang untuk membuktikan kesnya melampaui keraguan munasabah di penutup kesnya. Walaupun Timbalan Pendakwa Raya bersetuju bahawa hakim tidak memakai darjah melampaui keraguan munasabah, beliau berhujah bahawa biar apa pun darjah yang terpakai, hakim masih akan mencapai keputusan yang sama.

Diputuskan, membenarkan rayuan:

Isu dalam rayuan ini bukanlah seperti yang dihujahkan oleh Timbalan Pendakwa Raya. Isu adalah sama ada hakim telah memakai darjah membukti yang betul dan wajar di penutup kes pihak pendakwa. Isu mengenai sama ada pihak pendakwa di penutup kesnya dikehendaki membuktikan kes prima facie atau untuk membuktikan kes melampaui keraguan munasabah sudah pun dimantapkan dalam keputusan *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 di mana ia diputuskan bahawa darjah membukti di penutup kes pihak pendakwa ialah melampaui keraguan munasabah. Maka, memandangkan keputusan ini, boleh dikatakan darjah membukti yang terpakai dalam semua kes sama ada sebelum atau selepas keputusan *Arulpragasan* mestilah secara perlu melampaui keraguan munasabah. Tambahan pula, pindaan kepada s 180 Kanun Acara Jenayah (NMB Bab 6) bagi memperuntukkan darjah membukti prima facie di penutup kes pihak pendakwa berkuatkuasa hanya selepas 31 Januari 1997 dan tiada apa-apa dalam pindaan untuk memberikannya kesan kebelakangan. Maka, dalam rayuan ini, hakim terkhilaf dalam undang-undang apabila beliau memakai darjah membukti prima facie di penutup kes pihak pendakwa. Nyata terdapat penyalaharahan oleh hakim perbicaraan. Penyalaharahan jenis ini, yang menjejaskan akar umbi perkara ini, tidak dapat dipulihkan oleh peruntukan s 422 Kanun Acara Jenayah, kerana penyalaharahan melibatkan prinsip yang berkepentingan umum dalam pentadbiran keadilan (lihat ms 52C–H).]

Notes

For cases on the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Bahruni bin Ismail v PP [1997] 2 MLJ 265 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 180, 422
Prevention of Corruption Act 1961 ss 4(a), 13

Appeal from: Criminal Trial No 42–22 of 1994 (High Court, Kota Bharu)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): The appellant, an Inspector of Police was originally charged in the Sessions Court at Kota Bharu for accepting gratification of RM2,000 from one Tan Hung Kiang as an inducement for telling the said Tan Hung Kiang to leave Kelantan so that the police would not arrest him, an offence punishable under s 4(a) of the Prevention of Corruption Act 1961. The offence was alleged to have been committed at about 5.45pm on 29 February 1992 at Restoran Muhibbah, No 445 Jalan Dato' Nik Mustapha, Tanah Merah, Kelantan. At the end of the trial, the appellant was convicted as charged and he was sentenced to four months' imprisonment and fined RM4,000 or in default imprisonment for another four months. In addition, the court imposed a penalty of RM2,000 under s 13 of the same Act.

Not being satisfied with the decision, the appellant appealed to the High Court, which appeal was dismissed and the learned judge confirmed the conviction and the sentence imposed by the sessions court. He now appeals to this court.

His petition of appeal contains eight various grounds but at the outset of the appeal, learned counsel Mr Karpal Singh informed the court that he was pursuing only one ground that is the standard of proof. Learned counsel pointed out that the record of appeal show that at the close of the prosecution case in the sessions court, the learned sessions court judge applied the prima facie standard of proof before he called upon the appellant to enter his defence. It was his contention that at the time of the trial of this case in the sessions court, the proper standard of proof to be applied at the close of the prosecution's case was the beyond reasonable doubt standard. Therefore, he added, the learned sessions judge erred in

law in not holding that the prosecution was bound by law to prove its case beyond reasonable doubt at the close of its case. In his grounds of judgment too, the learned sessions judge said that at the close of the prosecution's case, he was satisfied that the prosecution had proved a prima facie case and proceeded to call upon the appellant to enter on his defence. A

The learned deputy public prosecutor while conceding that the learned sessions judge did not apply the beyond reasonable doubt standard, further contended that, whatever be the standard of proof applied, whether prima facie or beyond reasonable doubt standard, the sessions judge would have arrived at the same decision. B

With respect, we are unable to agree with this submission. The issue in this appeal is not as contended by the learned deputy public prosecutor. The issue is whether the learned sessions judge applied the right and proper standard of proof at the close of the case for the prosecution. C

The issue of whether the prosecution at the close of its case is required to prove a prima facie case or to prove a beyond a reasonable doubt case has been of great controversy for a number of years. As stated in *Bahruni bin Ismail v PP* [1997] 2 MLJ 265, 'without embarking into the history on this issue all over again' it has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 where at p 12 of the report it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan*'s decision, must necessarily be beyond reasonable doubt. D E

It would not be amiss to add here that since *Arulpragasan*'s decision, s 180 of the Criminal Procedure Code (FMS Cap 6) has been amended to provide for a prima facie standard of proof at the close of the case for the prosecution. This amendment, unfortunately for this case, took effect only after 31 January 1997 and there is nothing in the amendment to give it retrospective effect. F

Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr Karpal Singh that the learned sessions judge erred in law when he applied the prima facie standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice. G H

In the light of this, we allowed the appeal, quashed the conviction, set aside the sentence imposed and ordered a retrial before another sessions judge. We also ordered the penalty, if paid, to be refunded.

Appeal allowed. I

Reported by Jafisah Jaafar